

After reviewing the record and considering the arguments, the Appeals Board finds that the Award should be affirmed.

Findings of Fact

1. Dr. Stephen Ozanne examined claimant on January 28, 1994, at the request of respondent's insurance carrier. Claimant gave the following history leading to his July 30, 1993, accident as reported in Dr. Ozanne's records:

The patient had some type of injury in approximately 1984 which required a lumbar discectomy. At that time, he was having low back pain and bilateral leg pain, and after the surgery his symptoms improved until he fell in April, 1990. He was working at Boeing and states that he fell down a wet stairway. He sustained a compression fracture of L1-2. He was treated with rest and physical therapy, and about 4-5 months later was able to return to work. His symptoms were not totally gone, but they were better. In July, 1993, while at Boeing he was moving a very heavy metal desk which he estimated weighed about 400#. He was lifting and pushing on it when he had the sudden onset of severe pain in the lower back area going down both posterior legs to the level of the knees. He also had loss of bladder control at that time which has since resolved.

2. The Board finds that respondent retained claimant with knowledge of a preexisting impairment. Claimant was employed by respondent at the time of both the 1984 and 1990 injuries and respondent filed a Form 88 for each.

3. The Board also concludes that at the time of the 1993 injury, claimant was a handicapped employee. He has had a lumbar discectomy and subsequently fractured the L1-2 vertebrae. Some symptoms of those injuries remained at the time of the 1993 accident.

4. The Board finds claimant's injury of 1993 was an aggravation of the prior condition and would not have occurred but for the preexisting impairment. This conclusion is based on the testimony of Dr. Ozanne. Dr. Ozanne diagnosed lumbar strain secondary to the lifting incident at work in 1993. He also testified the strain was an aggravation of a preexisting injury. He stated that in his opinion the July 1993 injury would not have occurred but for the preexisting injuries.

Conclusions of Law

1. Under the law applicable at the time of claimant's accident, the Kansas Workers Compensation Act shifted liability for injuries to handicapped employees under certain circumstances. If the employer knowingly employed or retained a handicapped employee and that employee later suffered an injury which was caused or contributed to by the handicap, the Kansas Workers Compensation Fund is liable for all or a part of the benefits. K.S.A. 44-567.

2. The Fund is liable for all of the benefits of the disability that would not have occurred but for the preexisting impairment. K.S.A. 44-567.

3. If the disability would have occurred regardless of the preexisting impairment, but the resulting disability was contributed to by the preexisting impairment, the Fund is liable for the proportion of the award attributable to the preexisting impairment. K.S.A. 44-567.

4. Based on the above-stated findings of fact, the Board concludes the Fund should be responsible for all of the benefits paid in this case. The Board acknowledges ambiguity in the evidence from Dr. Ozanne. He provides a "but for" opinion but also states that the 1993 accident was sufficient to have caused an injury such as that sustained by claimant. But the Board concludes Dr. Ozanne's opinion, the only medical opinion in evidence, should be construed, as it has been by the ALJ, as an opinion that claimant's injury would not have occurred but for the preexisting impairment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish on April 8, 1998, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Vaughn Burkholder, Wichita, KS
E. L. Lee Kinch, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director